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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ..290

ANITA HERMAN,

Petititioner,

v.

NORTHWEST AIRLINES, INC. and
CAPITAL AIRLINES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

This case involves a private dispute over the right of Northwest Airlines, Inc. to defend against a claim arising in 1947 on the basis of tariff provisions existing *at that time*. Such provisions are not now, and have not been in effect since May 1, 1953, so far as the respondents are concerned. No similar provisions have been contained in the tariffs of any American air carrier since March 2, 1954. Accordingly, the issue is of no current interest, eight years later, to anyone other than the actual litigants.

The respondents will make a full statement of the case (Rules 24(1) and 40(3) of the Supreme Court of the

United States) to correct inaccuracies, omissions and unfounded assertions contained in the Petition, especially since the assertions in the Petition are unsupported by any references to the printed record as required by Supreme Court Rule 40(e).

On April 20, 1947, well over eight years ago, at Cleveland, Ohio, the petitioner purchased a ticket for transportation by air (Exhibit A, Appendix to Appellant's Brief, p. 19). The ticket was "sold subject to tariff regulations."[1] The ticket, which was sold by Capital Airlines, Inc., covered transportation on Capital's lines from Cleveland to Chicago, Illinois, on May 3, 1947 and a later flight from Chicago, Illinois to Seattle, Washington on the lines of Northwest Airlines, Inc.

On October 28, 1948 (fol. 2)[2] the petitioner served a complaint. She had never reported any alleged in-flight accident (fol. 93) and had never notified either of the companies about this alleged, unwitnessed event at any time before service of the complaint (fol. 120). Indeed, prior to such service, over seventeen months later, neither of the companies had received any information, oral or in writing, from anyone concerning the alleged accidental injury to the petitioner (fols. 126-127, 136).

In the original complaint the petitioner alleged the ticket had been purchased on about May 1, 1948, and the flight occurred on May 6, 1948. A thorough search by Northwest of its voluminous departure control sheets and passenger manifests for all of its flights on the day in question, as well as for a reasonable period before and after, showed that the petitioner was not listed as a pas-

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[1] The petitioner has never questioned that the sale of the ticket "subject to tariff regulations" would normally result in establishing and defining the legal relationship of the parties. *Western Union Telegraph Company* v. *Esteve Bros. & Co.*, 256 U. S. 566.

[2] All folio references are to the Appendix to appellant's Brief in the United States Court of Appeals for the Second Circuit.

senger at or about the time alleged in the complaint (fol. 148). It was not until March 22, 1949, when the petitioner's deposition was taken, almost two years after the alleged episode, that she fixed the date of the alleged occurrence as May 4, 1947 (fols. 78, 81, 90). Thus, the petitioner's admittedly false allegations effectively prevented the respondents from even beginning to investigate her unfounded assertions until almost two years after the alleged event.

The petitioner's claim, as presented in the examination before trial (fols. 73-120), is so vague that it is difficult to state how the alleged accident (if there ever was an accident) occurred. For all purposes in the Courts below, the petitioner's testimony has been taken at face value. According to her, the flight from Cleveland to Chicago on the plane of Capital Airlines, Inc. was, in all respects, routine and nothing untoward then happened (fol. 87). The petitioner said that at some time, which she could not definitely fix, during the flight from Chicago to Seattle, on a plane of Northwest Airlines, Inc., something happened to her. She said that sometime after midnight she fell asleep and "was jolted several times out of my seat; and once I found myself—the small of my back—on the edge of the seat and my head on the arm rest" (fol. 88). She said that she had a bleeding from her mouth and nose and "this terrible twist in the back of my neck" (fol. 89). The stewardess, according to the petitioner, thought that the petitioner's difficulties were due to the altitude and gave her some aspirin (fol. 89). According to the petitioner, neither she nor anyone else had safety belts secured at the time and there were people walking around in the plane (fols. 89, 90), the clearest indication there actually was no turbulence.

As to the time of the event, from which the respondents might ascertain where the plane was at the time of the alleged occurrence, all the petitioner would say was that the alleged event was after midnight (fol. 90), which would

be sometime on May 4, 1947. Another attempt to fix the location of the plane at the time alleged was equally unavailing, because the petitioner said she could not remember whether any stops had been made after the plane left Chicago and before the alleged event (fol. 91). Nor could the petitioner state the name of the hostess (fol. 91), which might help fix the place of the occurrence, since one stewardess did not make the entire flight (fol. 157).

Petitioner, a nurse by profession (fols. 113, 114), did not seek any medical treatment or advice until January 3, 1948 (fol. 101), eight months later. On July 10, 1948, fourteen months later, an X-ray demonstrated a fracture line of the skull (fols. 178-180), but no brain damage could be found (fols. 180-186). The allegation in the petition (p. 7) to the contrary is unsupported by any folio reference. Indeed, the petitioner does not support anything in the "Statement of Facts" by any reference whatever. Apparently, the petitioner's attorney attributes this facture line to some alleged episode aboard the plane (petition, p. 7).

At the time when the ticket was sold, and at the time when the petitioner was transported, there were certain tariff rules (Appendix to appellant's Brief, p. 55) in effect. The rule relating to claims was as follows:

> "5. Claims
>
> I. No action shall be maintained for loss or damage to the property or baggage of a passenger, or for injury to his person, or for any delay in transportation unless notice of the claim is presented in writing to the general offices of the participating carrier on whose lines the loss, damage, injury or delay occurred within 30 days after the occurrence of the loss, damage, injury or delay, and unless the action is actually commenced within one year after such occurrence."

Both of the respondents were operating under Certificates of Public Convenience and Necessity issued by the

Civil Aeronautics Board (fols. 128, 137) and had fully complied with all requirements concerning the filing of their tariffs in accordance with the Economic Regulations of the Civil Aeronautics Board (fols. 194-201, 205-206).

The respondents interposed the tariff defenses in their answers and moved for summary judgment in order to avoid the enormous cost of defending the case on the merits. Since the petitioner could not identify the stewardess, the respondents would require as witnesses the stewardesses on the entire flight from Chicago to Seattle, as well as the pilot and co-pilot and passengers, all for the purpose of showing that the flight was entirely routine and no unusual events occurred. The respondents would also require the records of the radio messages to prove the flight was entirely without unusual event, as well as the System Chief Meteorologist and employees of the U. S. Weather Bureau to demonstrate that thermal turbulence would not cause undue roughness of the air, that the air mass covering the entire route was uniform and that the route flown did not cover rough terrain to an extent where mechanical turbulence would be significant (fols. 157, 158).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure the respondents moved for summary judgment, assigning the foregoing tariff provision as a common ground for relief (fols. 118a and 119b). The petitioner tendered no dispute of fact (fols. 204, 205). Additionally, the respondent, Capital Airlines, Inc., submitted affidavits demonstrating that as matter of fact, as well as of tariff rule, it had acted only as a disclosed agent for the passage on Northwest Airlines, Inc. (fols. 124, 133).[3] Here, again, the petitioner did not challenge the allegations. Neither in the District Court nor in the Court of Appeals did she question the propriety of summary judgment in favor of Capital

[3] Under the circumstances Capital would not be liable for any tort committed during transportation by Northwest. *Pennsylvania Railroad Co.* v. *Jones*, 155 U. S. 333, 339.

Airlines, Inc. Nor is there any reference in the petition to indicate why the petitioner continues to involve Capital Airlines, Inc., since one basis for granting it summary judgment has never been and is not now disputed by the petitioner.

In a written opinion dated June 7, 1951, the District Court held the respondents were entitled to a summary dismissal of the complaint on the defense in the answers, that the suit had not been commenced within one year after the alleged occurrence, as required by the tariff (fols. 202-208). There was no decision concerning the tariff requirement for written notice of claim within 30 days (fol. 208). The District Court simply held that under the doctrine of "primary jurisdiction" the provisions of a tariff filed with the Civil Aeronautics Board are deemed valid until the Board rejects the provisions and the "reasonableness" of a tariff can be raised in the courts only after the petitioner had exhausted the administrative remedies provided by the statutes. The District Court relied for its decision upon the cases of *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, *Civil Aeronautics Board* v. *Modern Air Transport*, 179 F. 2d 622, and *Lichten* v. *Eastern Airlines, Inc.*, 189 F. 2d 939. Judgment was entered on June 22, 1951 (fol. 209-211) and the petitioner filed a notice of appeal.

A little less than four years after judgment (eight years after the alleged injury), the petitioner brought the appeal on for argument in the Court of Appeals. Judge Learned Hand, writing for a unanimous Court of Appeals, affirmed the dismissal of the complaint by opinion dated May 5, 1955, and on June 1, 1955, the Court of Appeals for the Second Circuit denied the petitioner's motion for further time to file a petition for rehearing there.

The Court of Appeals said that there was but one problem really before it for decision, and that was whether a tariff was "to be deemed valid until the Board declared it

was not", because at no time had the petitioner ever asked leave to present the question before the Civil Aeronautics Board. The Court held that the petitioner's argument, that the Board's power did not extend to a regulation limiting the time for suit, was groundless on two bases, namely, (1) under the provisions of 49 U. S. C. 642, the Board has power to hear complaints and make investigations of any regulation affecting the value of the service rendered by a carrier—which a limitation of time for suit obviously does—and (2) the Board clearly had jurisdiction of the rule or regulation, since such a regulation was required to be filed pursuant to 49 U. S. C. 483(a) and the Board's regulation, paragraph 224. 1(e)(7). Since the tariff regulation involved here was not one exculpating the carrier from the consequence of its own negligence, or limiting the recovery to anything less than actual loss or injury, the sole question was one of "reasonableness" of the time for suit, and as to that matter the Board had the power of decision.

On August 3, 1955, the pending petition was filed in this Court.

Grounds Why the Cause Should Not Be Reviewed

1. The cause involves a private dispute over the applicability of an air carrier's tariff in 1947, and is without interest to anyone else, since the entire practice was changed by the respondents in 1953, and by all American air carriers in 1954.

2. The alleged constitutional basis for review is feigned.

3. The Court of Appeals for the Second Circuit followed the decisions of this Court in disposing of the cause.

ARGUMENT

The cause presents no constitutional problems and the actual issue is only of hypothetical interest to anyone except the particular litigants.

An extensive discussion of the factors enumerated in Supreme Court Rule 19 is deemed surplus. The full impact of the words written by Mr. Chief Justice Taft in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393, appears not to have been diminished by subsequent adjudication. He wrote:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

While the case did contain Constitutional problems, which immediately distinguishes it from the one at Bar, and although the exact problem was the dismissal of a writ as improvidently granted rather than the granting of a writ in the first instance, the opinion of Mr. Justice Frankfurter in *Rice* v. *Sioux City Cemetery*, —— U. S. ——, 99 L. Ed. —— (Advance p. 507) No. 28—October Term, 1954 (Decided May 9, 1955) seems apposite.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for

the benefit of the particular litigants. (*Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v. vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341."

In the *Rice* case, subsequent statutory enactment would govern any litigation arising in the future under similar circumstances so that the issues actually tendered by the parties to the suit had become of "isolated significance." In the case at Bar, the tariff provision which is its core, has not been effective since May 1, 1953 (C. A. B. Order No. E-7348, Docket No. 4059, *et al.*). Since March 2, 1954, no American air carrier has had any comparable tariff provision and none will be found in future tariffs. (*Matter of the Personal Injury Rules Case,* C. A. B. Docket No. 6149, Order No. E-8060 and Economic Regulations, Part 221 as amended by Regulation ER-195.)

In an effort to arouse the interest of this Court in a stale, unmeritorious claim and a problem of no current interest to anyone else, the petition is saturated with quotations from the Constitution of the United States (Petition, pp. 2, 3, 4, 6) and with general allegations that something, somewhere, somehow, must be "unconstitutional" because the petitioner's case has been lost (*e. g.,* at Petition, pp. 9, 10, 11, 19, 20, 23, 24, 25). The petition speaks glibly of

some constitutional invasion by a private party of powers granted to the legislative branch of the Government; of a similar invasion or usurping by the Judiciary; of general rights to due process of law, and even of State's rights. None of these generalities is supported by the citation or discussion of any authority dealing with the alleged constitutional problems. The petitioner has inverted the usual format of a petition, having made sweeping allegations of constitutional problems in the body of the petition, whereas, in fact, the real problem which is sought to be reviewed is to be found in the footnotes.

Apart from the absence of constitutional authorities in the petition, neither at the District Court level nor before the Court of Appeals was there ever involved any constitutional question. Particularly, no part of the Civil Aeronautics Act of 1938 (49 U. S. C. 401, *et seq.*) was ever challenged. Had the petitioner ever questioned, seriously or not, the constitutionality of the Act, then her attorney would have complied with General Rule 22 of the Eastern and Southern Districts of New York, which requires a party so situated to notify the Chief Judge, in writing, of the existence of the question so that the Court can comply with 28 U. S. C. 2403. It would seem to be the fact that even now the petitioner really challenges nothing on constitutional grounds.

The issue here is not even whether the tariff was valid or reasonable in 1947. The problem presented by the petitioner is only whether the courts below have correctly decided that the tariff was *presumed* reasonable in 1947 under the doctrine of "primary jurisdiction", unless and until the Civil Aeronautics Board adjudged otherwise.

Because of the odd nature of the petition, it should be read against a brief historical background of the Civil Aeronautics Act and what the Civil Aeronautics Board has done under that Act.

The Civil Aeronautics Act of 1938 (49 U. S. C. 483) required air carriers to file tariffs in two different situations. While all of the provisions of the law are mandatory, since they are prefaced with the phrase, "shall file with the Board", Congress gave to the Civil Aeronautics Board certain latitude concerning some parts of tariffs. The statute required that the carriers "shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it and between points served by it and points served by any other air carrier or for an air carrier when through service and through rates shall have been established. * * *"

49 U. S. C. 483 contains further parts of the statutory scheme, in that it also requires that the tariffs filed shall show "to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation." By its very terms, the statute contemplated that the tariffs, as filed, would include much more than simply rates, fares and charges. The statute left to the judgment of the Civil Aeronautics Board the extent to which the rules, regulations and practices of the carrier were to be included.

Beginning with the enactment of the statute in 1938, there was a wide-spread practice of air carriers to file with the Civil Aeronautics Board tariffs containing stipulations concerning the time for suit. This was deemed advisable in the absence of a Board adjudication to the contrary (as well as because of definite Board rulings referred to hereinafter), because it is commonplace for flights to encompass many States within a very short period of time and local statutes of limitations vary from place to place. In the case at Bar, the flight covered seven States and, in view of the fact that many State statutes of limitations are tolled by the absence of a prospective defendant, the end result

would be that without some tariff rule or regulation on the subject some suits could be instituted without any practical limitation whatever as to time. In the case of accidents at airports, or crashes, the problem was not complex, but it has been often difficult, if not impossible, to determine in what State an injury of the type alleged here did occur. With an alleged, unreported, in-flight occurrence, where the petitioner can not even fix the time of the occurrence, it is beyond human ability to ascertain what State statute might apply. The end result of looking to a State statute of limitations in a case such as the one at Bar was generally deemed unworkable, and so, for the purpose of putting some end to the time for litigation, American carriers generally filed tariffs containing the time limit, as the respondents did here.

The Civil Aeronautics Board has changed the practice, effective March 2, 1954 (Regulation No. ER-195). Balancing the advantages to the air carriers which would result from a uniform Federal rule concerning the time for suit against the disadvantages to the traveling public and their lawyers, who, according to the Board, are ignorant of tariff regulations and look only to the State laws where the injury has occurred, the Board decided that after March 2, 1954, the matter of time for suit would be left to the law of the State where the event occurs. In short, the Board adopted the view that a different sort of uniformity of rules concerning the bringing of suits for personal injury and death would be best. The uniformity achieved is simply that a passenger of an air carrier will be in exactly the same position as anyone else injured at the place where such injury occurs. Of course, this leaves a carrier in the future without any practical limitation in a case such as the one under consideration, but this is a matter within the discretion of the Civil Aeronautics Board. It has decided the issue, and that is the end of the matter so far as passengers are concerned after March 2, 1954.

Up until 1953, the Civil Aeronautics Board never rejected tariffs with provisions for time for suit and time for notice of claims, although its power in that field is obvious. Under Economic Regulations, Part 221.4, was a requirement for the statement of "general rules which govern the tariff, *i. e.*, state conditions which in any way affect the rates named in the tariff for the service under such rates." So far as an actual requirement by the Board for the filing of such tariff rules, the Board itself has said, in promulgating Regulation No. ER-195, amending Economic Regulations, Part 221 (14 CFR 221): "In view of the practice of the air carriers and the course of administrative dealing with these rules, it cannot be definitely stated that the filing of tariff liability rules has not been required by Board regulations." The importance of the matter may be found partly by referring to 49 U. S. C. 622, which makes the failure by an air carrier to comply with the Regulations of the Board a violation of law.

In December 1951, an aircraft of Continental Charters, Inc. crashed, with resultant death to 26 passengers and injury to 14. This event set in motion a chain of events resulting in various investigations by the Civil Aeronautics Board, culminating in several stipulations in 1953 and amendments of the Economic Regulations in 1954. What has actually transpired in the interim has been erroneously presented in the petition before this Court.

The crash to which reference was made resulted in the presentation to the Civil Aeronautics Board of *Continental Charters, Inc.—Complaint of Mary Battista* (Docket No. 5573, Order Serial No. E-7087). While the injured passengers were in the hospital, various representations were made to them by the president of the carrier and adjusters of the insurance company. After 30 days expired, all of the assurances were withdrawn and the complainants were told that no consideration would be given to their claims because of a rule in the tariff requiring claims to be presented, in

writing, within 30 days after the occurrence of the event giving rise to the claim, which the complainants had not done. Two of the complainants sued in the United States District Court for the Southern District of Florida. The respondent filed a motion to dismiss, based in part on the failure to comply with the notice provision of the tariff. The Court postponed hearings on the motion so that the complainants might seek a finding from the Civil Aeronautics Board "as to the lawfulness of the rule". This delay was at the request of the complainants and pursuant to the doctrine of "primary jurisdiction," which is the doctrine which has been applied in the case at Bar. Thereupon, four surviving passengers and the estate of a deceased passenger filed a complaint with the Board to determine the validity of the tariff rule requiring a 30-day notice of claim.

The Board found that the particular rule for 30 days notice in the *Battista* case under the facts was unreasonable and therefore was ruled invalid. The Board stated that it did not go beyond the facts of the case before it, and certainly nothing was adjudged other than the reasonableness of the requirement for notice of claim.

Thereafter, the Civil Aeronautics Board began an investigation of the entire subject of tariff regulations dealing with notices of claims and time for suit. This investigation was entitled, *"In the Matter of the Personal Injury Rules Case,* Docket No. 6149". The tariff matter presented by the petitioner here was set at rest for the future and the proper scope of the *Battista* decision was enunciated by the Board on January 25, 1954, when it brought the investigation to a close by Order No. E-8060 and simultaneously adopted Regulation No. ER-195. In the latter regulation, the Board amended Part 221 of Economic Regulations, effective March 2, 1954, in the following way:

> "No provision of the Board's regulations, issued under this Part or elsewhere, shall be construed to

require, on and after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction, except to the extent that such regulation shall do so in express terms."

In Regulation No. ER-195, the Board referred to its adjudication in the *Battista* matter ("without deciding whether such tariff rules were required to be filed") where it had held that a written notification of claim requirement within thirty days after the occurrence was unreasonable. Beyond that, the Board had not gone. Its purpose in amending the Economic Regulations was clearly stated in the following way:

> "The purpose of the regulation hereby adopted is to make it absolutely clear that from and after the effective date of this amendment, the Board's regulations will not require the filing of such tariff rules. In so doing, the Board is not passing upon the reasonableness of any such rule, nor of the legality of any such practice. Neither is this regulation an interpretation of the Board's earlier regulations, and any rights which have accrued prior to the effective date hereof will be governed by the law and regulations as they existed prior to the effective date hereof."

In Order No. E-8060, the Board said that the issues in the proceeding were whether the Civil Aeronautics Act or the Board's regulations in effect up to that time required the filing of tariff rules limiting an air carrier's liability for personal injury or death, and if so, whether such rules as were involved in that proceeding were reasonable and lawful. The Board pointed out that there was no party in that proceeding who was in need of a determination whether the tariff rules were ineffective as to him as of a

certain time in the past. Thereby the Board distinguished the *Battista* situation. The Board pointed out that the need for any determination of that character in the future had been obviated by Regulation No. ER-195. The Board said: "It should be made clear that the determination of this investigation does not involve any findings as to the fileability or the reasonableness of the tariff rules in issue under the Act and our Economic Regulations prior to the effective date of Amendment No. 1 to Part 221. If and when it becomes necessary to make such determinations, as for example in a situation like the *Battista* case, the Board will institute an appropriate proceeding to deal with the matter."

Neither by its determination in the *Battista* matter, nor by its investigations, nor by any stipulation, has there been any adjudication by the Board that the tariff regulation for suit within one year was in any way unreasonable or unlawful. What occurred years later in connection with the prospective operation of tariffs of this type serves merely to accent the age of the pending case. By Order Serial No. E-3183, the Board instituted an investigation with reference to many of the liability rules in various tariffs. As to Northwest, its counsel in that proceeding stipulated with Bureau counsel to change certain of the tariff rules. The personal injury rules (parts of 14 and 17 of Charles C. Hubbard's Tariff C. A. B. No. 27) were eliminated and various modifications were made with reference to baggage claims, the amounts of limitation, time for claims, time for suits, etc. By Order No. E-7348, dated May 1, 1953 (Docket No. 4059, et al.), the Board approved the stipulation and dismissed the matter with respect to Northwest Airlines, Inc.

So far as present day aviation is concerned, the problem concerning Northwest Airlines' tariff provision in 1947, and similar provisions of other American airlines, has long since been laid to rest. With the foregoing historical mat-

ters well known to the petitioner's counsel, Judge Learned Hand wrote:

> "* * * Judgment was entered in June 1951 and neither at the hearing before the judge nor after the opinion or judgment was filed did she ask leave to present to the Board the invalidity of the regulation, so that the only question upon this appeal is whether it was to be deemed valid until the Board declared that it was not."

The effect of the adjudication is simply this: The District Court and the Court of Appeals for the Second Circuit have said, in effect, to the petitioner—you alleged the carrier's tariff requiring you to bring your action within one year is unreasonable. The issue of time for suit was tendered by the carriers more than six years ago. Under Act of Congress (49 U. S. C. 642) the Civil Aeronautics Board has been given the power and authority to hear your grievance. You have refused to present it there, where the law says it should be. We will simply apply the rule of law promulgated by the Supreme Court of the United States that, under such circumstances, a tariff provision is deemed valid. The law has given you the right to an adjudication of your problem before the Board. You have chosen not to follow the law and you cannot expect us, the Judiciary, to violate the law and take on the role of the Civil Aeronautics Board, to which the statute has clearly given this function of determining "reasonableness."

The statute itself, in the clearest language, requires the adjudication which has actually been made. 49 U. S. C. 642(a)(d)(g) gives to the Board the authority, either upon its own initiative or upon the complaint of any person, and after notice and hearing, to decide whether any classification, rule, regulation, practice, rate, fare, or charge is unjust, or unreasonable, or unjustly discriminatory, or unduly preferential, or prejudicial. Upon so finding, the

statute gives power to the Board to determine and prescribe lawful rates, fares, charges, classifications, rules, regulations and practices. The Board not only has authority to conduct a hearing upon any new tariff filed with it, but it has the power to suspend the operation of a tariff pending its decision. Where the legality and reasonableness of a tariff are involved, the doctrine of "primary jurisdiction" is obviously to be applied.

While the petitioner seeks to give the matter some Constitutional feigned implications by the most patently untenable argument about the judiciary usurping the legislative functions (Petition, pp. 9-19), *the petition actually admits that what the Courts below have adjudged is entirely in accord with the statutes.* Says the petitioner, "Primary jurisdiction to determine the effect of tariff regulations filed with the Civil Aeronautics Board rests with the Board pursuant to the Civil Aeronautics Act of 1938" (Petition, p. 9). And, again, "The Civil Aeronautics Board has the primary jurisdiction to determine and prescribe the lawfulness and reasonableness of an arbitrarily filed airline tariff" (Petition, p. 10). The doctrine of "primary jurisdiction" (which the petitioner urges is proper) is apparently assigned as the first ground for review here, while, in fact, *that very doctrine is the exact basis of the decisions in both Courts below.* Among the cases cited in footnote 14 of the petition, are *Lichten* v. *Eastern Airlines, Inc.,* 189 F. 2d 939 and *Civil Aeronautics Board* v. *Modern Air Transport Inc.,* 179 F. 2d 622, both decided by the Court of Appeals for the Second Circuit. The basic principle therein enunciated has been applied by that same Court in this case.

What, then, is the petitioner's *actual* position? It is that the Courts have not done what they cannot do and what the petitioner, herself, should have done in 1949, assuming there ever was any sincerity to her protestations. The grievance is that the Courts below have failed to

refer the matter to the Civil Aeronautics Board. The issue of time for suit under the tariff has been involved in this case for more than six years (fols. 2, 22). If the petitioner felt aggrieved by the tariff, it was *her* right under the statute to present the matter to the Civil Aeronautics Board. The reason that was never done is fairly apparent because with a claim so suspicious as this, the petitioner never expected the Board would upset a course of practice going back to 1938, especially where the tariff provisions are now of no interest to anyone other than the parties to this suit.

Where does any District Court derive a power "to refer the matter to the Civil Aeronautics Board for determination?" There is obviously no power or duty in any Court to compel the Civil Aeronautics Board to entertain and investigate a *nonexistent* complaint. The procedure under the statute is well known to the petitioner's attorney. Where a litigant is met with the defense of a tariff provision, which is thought to be unreasonable, the litigant simply files a complaint with the Board. If the carrier makes any affirmative gesture involving the tariff provision in the law suit while the complaint is pending and undecided before the Board, a simple request is made to the Court where the law suit is at issue to withhold decision awaiting the outcome of the Board's adjudication. That is what was done in the *Battista* matter.

The petitioner's attorney had no reason to expect the Board would invalidate an air carrier's tariff provision for suit within one year (and this in a case of an unwitnessed, unreported, unheard of "accident" in-flight) especially since Congress had legislated that a provision for suit within one year was perfectly reasonable under any circumstance for ocean carriers. (46 U. S. C. 1303). So he glibly places the burden for the failure to present the problem to the Board upon the Courts instead of upon himself.

The effect of applying the rule of "primary jurisdiction" to the case at Bar is exactly the opposite to that which the Petitioner infers. Assertedly, there has thus been "undue invasion by the district court in the field of legislation and legislative authority" (Petition, p. 19). Actually, the Courts have applied the law as Congress enacted it and have effectuated the legislative desire that matters of this character be determined initially by the Board. 49 U. S. C. 642 (a) (d) (g). The Court of Appeals wrote here:

> "* * * Assuming for argument that no regulation ought to be allowed to relieve the carrier of its duty (of care for a passenger), there is every reason for allowing the Board to pass upon the adequacy of the time for suit."

According to the petition, it is alleged that the sole reason for granting a writ of certiorari is that the "courts below (have offended) Article I, Section 1, of the Constitution of the United States, conferring upon Congress exclusive powers to enact law" (petition, p. 8). The simplest answer to such an assertion is that the Courts here have legislated nothing. They have simply followed the statute as it has been written and have held, in effect, that for over six years the petitioner has had every right and opportunity to present the question to the Civil Aeronautics Board and has refused to do so. The statute gives the fundamental power and authority to hear this grievance to the Civil Aeronautics Board, and since the petitioner has refused to present her complaint there, the Courts have presumed the old tariff to have been valid, there being no contrary adjudication by the Civil Aeronautics Board. To detract from the power of that Board in a factual situation such as that presented here, would be doing a disservice not only to the Board, but, perhaps, even to the petitioner, since one day there must come an end to this stale and unmeritorious claim.

CONCLUSION

In view of the foregoing, a writ of certiorari should not be issued.

Respectfully submitted,

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